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1 [The Military Commission was called to order at 0908, 14 June
2 2013.]

3 MJ [COL POHL]: This closed session of the commission is
4 called to order. All parties are again present. The accused
5 is absent and, as stated before, this is a closed session to
6 consider AE 092.

7 Trial Counsel, it's your motion.

8 ATC [MS. BALTES]: Thank you, Your Honor. For the
9 record, present for the prosecution today, Joanna Baltes,
10 Brigadier General Mark Martins, Mr. Justin Sher,
11 Commander Lockhart, Major Chris Ruge, Sergeant [REDACTED],
12 [REDACTED], Lieutenant Bryan Davis, [REDACTED]
13 from the FBI -- she's an attorney with the FBI -- and Mr. Bob
14 Swann who's Trial Counsel on the 9/11 team.

15 MJ [COL POHL]: And everybody on your side of the table
16 has got the appropriate clearances?

17 ATC [MS. BALTES]: That's correct.

18 MJ [COL POHL]: And for the defense, I believe we have
19 Mr. Kammen, Captain Jackson. Who else do we have here? Major
20 Danels.

21 LDC [MR. KAMMEN]: Major Danels, a paralegal, Tech
22 Sergeant [REDACTED], and Captain Eric Winkofsky.

23 MJ [COL POHL]: And they all have appropriate

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1 clearances?

2 DDC [MR. KAMMEN]: Yes.

3 MJ [COL POHL]: Okay. Thank you.

4 LDC [MR. KAMMEN]: Yes.

5 MJ [COL POHL]: Ms. Baltes.

6 CP [BG MARTINS]: And I spoke to members of your staff
7 earlier that we were going to address whether or not the
8 guards in the court had the appropriate clearances. I'm not
9 sure if you wanted to address it on the record or not.

10 MJ [COL POHL]: There is no need for the guards, so we
11 don't need clearances. They should just -- we don't need you,
12 right now. I mean, I don't see any need for the guards at
13 all, so we don't need to go through whether they have
14 clearances or not.

15 ATC [MS. BALTES]: Okay. Thank you.

16 MJ [COL POHL]: I would note for the record, though, as
17 they leave, is that is was always my understanding that
18 because everything in here is -- go ahead and leave, guys --
19 everything in here is potentially classified, that all the
20 guards had clearances in case there was classified information
21 discussed in an open session.

22 ATC [MS. BALTES]: I believe the guards do have a
23 certain level of clearance; whether or not they have the

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1 compartment that we're going to be -- that's a discrete issue
2 today. And it's more out of an abundance of caution. If you
3 prefer them to be here, we can give them an admonishment.

4 MJ [COL POHL]: I understand. I just don't see any need
5 for their presence anyway, so let's make the issue go away.

6 LDC [MR. KAMMEN]: I know Colonel Bogdan thinks that we
7 are planning on assassinating people, but we are really not.

8 MJ [COL POHL]: I trust you, Mr. Kammen. Go ahead.

9 LDC [MR. KAMMEN]: There is a lady at the very back of
10 the room.

11 ATC [MS. BALTES]: And that is [REDACTED] she's
12 from the FBI, she's an attorney with the FBI.

13 MJ [COL POHL]: All right. Go ahead.

14 ATC [MS. BALTES]: Thank you, Your Honor. Your Honor,
15 as we briefed in the AE 92 that we filed with the commission
16 and with the defense and also in the ex parte presentation
17 AE 91, I am going to be brief. I think it is clear that the
18 relief that we are requesting [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 The motion was filed in both the 9/11 and the

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1 Nashiri case because it potentially implicated the accused in
2 both cases and, therefore, we wanted a resolution from this
3 commission since the military judge is the same, obviously, in
4 9/11 and Nashiri.

5 As you are aware from our papers, there was
6 similar litigation in the District Court for the District of
7 Columbia regarding the habeas proceedings, because there is
8 currently a case management order

9 [REDACTED]
10 So in that
11 proceeding, the government also requested

12 [REDACTED]
13 [REDACTED]
14 So in that case, the government requested

15 [REDACTED]
16 [REDACTED]
17 Now, the reasons for the
18 government's request are explained in the ex parte filing in
19 AE 91 and in the declaration that we filed signed by Leon
20 Panetta who at the time was the director of the Central
21 Intelligence Agency.

22 And as explained in AE 92, the specific nature of
23 the request, the reasons why, and the national security

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1 reasons are extremely sensitive and that is why we provided
2 general notice to the defense but we provided more specific
3 reasoning on that to Your Honor. However, all of the legal
4 justification, the foundation that we set forth in the
5 pleading we filed with you, obviously we filed with the
6 defense as well.

7 And I just want the defense to understand that we
8 have not made any additional requests in the ex parte filing
9 that we have not made in the filing that the defense has a
10 copy of; it's the justification and the national security
11 reasons why the United States Government

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17 MJ [COL POHL]: Ms. Baltes, you had said earlier that
18 there was -- in the habeas litigation, there was at least one
19 District Court order addressing this issue that you asked to
20 be -- are those still out there or --

21 ATC [MS. BALTES]: Yeah. In the habeas case, there are
22 several case management orders that govern all the habeas
23 cases, because there are different District Court judges. So

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1 there is a general kind of case management order.

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8 So they went to the chief judge asked
9 for, again, a consolidated ruling because there are multiple

10 District Court judges.

11 So that ruling has been issued and that is what we

12 attached to the filing in AE 92, is the judge's ruling in that

13 litigation

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17 MJ [COL POHL]:

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19 We

20 have in this case, you as the proponent of this ----

21 ATC [MS. BALTES]: Yes.

22 MJ [COL POHL]: ---- of this action;

23 But at

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1 the end of the day, we are all at the same place. [REDACTED]

2 [REDACTED]

3 ATC [MS. BALTES]: [REDACTED]

4 MJ [COL POHL]: [REDACTED]

5 [REDACTED]

6 ATC [MS. BALTES]: That's correct, that's correct. And
7 I think that, as you pointed out in our 505(h), [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 Now, since we originally filed the notice, though,
14 the response of both the defense in this case and in the 9/11
15 case have [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] There is language in the supplement filed
21 by the defense in this case that it would be important for the
22 members themselves [REDACTED]

23 And so I think that the government is now in a position that

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1 we are faced with a discovery request [REDACTED]

2 [REDACTED]

3 So whether or not, you know, this commission felt
4 that there was jurisdiction. [REDACTED]

5 [REDACTED] I think it is ripe because at this point

6 [REDACTED] the defense has sought [REDACTED]

7 [REDACTED] I think it is squarely before Your
8 Honor at this point.

9 MJ [COL POHL]: Do you oppose the defense request [REDACTED]

10 [REDACTED]

11 ATC [MS. BALTES]: Yes. Yes, we would. And maybe I
12 should just jump straight into the heart of the government's
13 argument here. The government does not believe [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 The government understands its discovery
19 obligations. I'm not going to belabor the point. I know you
20 have heard us, both in oral argument and in written motions,
21 set forth what we understand what our discovery obligations
22 are. But I do think it is important to kind of distinguish
23 between [REDACTED]

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1 [REDACTED] and what the general
2 discovery obligations are.

3 I know that the defense characterizes this
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 And as you are aware, the government has provided
12 many hundreds of reports that detail the treatment of
13 Mr. Nashiri while he was in CIA custody in one or more
14 overseas locations. Those reports have been summarized and
15 the discoverable information contained in those reports has
16 been provided to the defense in this case. So anything about
17 his treatment while he was in CIA custody has been provided to
18 the defense. In addition, to the extent that the government
19 has any photos in their possession of Mr. Nashiri while he was
20 in CIA custody, those will be provided to the defense.

21 The defense also has received numerous government
22 documents regarding OLC reports or opinions on the entire
23 rendition/detention/interrogation program. They have sought

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1 access to any unredacted portions that go to anything
2 regarding Mr. Nashiri, and to the extent that any of the
3 unredacted portions of those documents that discuss the
4 treatment, the legality of the treatment or Mr. Nashiri
5 himself, those will be provided to the defense as well.

6 So there is a lot of information that the defense
7 has already, or will receive very shortly.

8 [REDACTED]

9 [REDACTED]

10 The fact that [REDACTED]
11 [REDACTED] is completely consistent and standard with any other
12 case that would be going on. And I know this is a capital
13 case so I don't want to make generalizations or minimize this
14 case or put any relative comparison, but the fact is this is a
15 court, this is a commission.

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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1 [REDACTED]
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4 [REDACTED] they will have all of the
5 discoverable information that could possibly be relevant and
6 material in this case, even for mitigation. And we understand
7 that is a big part of the reason why they want this
8 information.

9 I think it's -- again, their request at this point
10 [REDACTED]
11 [REDACTED] so we have to look at what the discovery
12 standards would be for that. And R.M.C. 701 discusses
13 relevance in the context of what is material, what is material
14 to the preparation of the defense. And United States v Yunis
15 is the case that is cited actually in the manual for what is
16 the meaning of material to the preparation of the defense.
17 And Yunis was the case that actually discussed what it means
18 in a classified setting if the defense is seeking access to
19 something classified, which they would be here.

20 And the Yunis case I think is important because it
21 talks about you can't have just a showing of theoretical
22 relevance, something can't just be helpful, it has to rise to
23 the level where it would potentially have a tendency to make

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1 the existence of any fact that is consequence to the
2 determination of the action more or less probable.

3 And again, what the government has provided to the
4 defense or will provide to the defense [REDACTED]

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11 Now, again, the government's contention here it is
12 not discoverable.

13 LDC [MR. KAMMEN]: Can you say that again? I didn't
14 hear it, the last sentence.

15 ATC [MS. BALTES]: The government's contention is that
16 it is not discoverable.

17 And just going back for a minute to the District
18 Court litigation. When the District Court judge approved, in
19 the habeas context, [REDACTED]

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22 [REDACTED] but that would
23 not be discoverable -- that was not discoverable.

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1 Now, that doesn't mean that at a later time if the
2 judge in that case determines for some reason that it is
3 discoverable, that it can't be provided to the defense. It
4 will be. [REDACTED]

5 MJ [COL POHL]: [REDACTED]

6 [REDACTED]

7 ATC [MS. BALTES]: [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 MJ [COL POHL]: I got it.

12 ATC [MS. BALTES]: [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 And the attachment to the government's submission
19 here did actually have a copy of Judge Sullivan's order.

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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10 MJ [COL POHL]: Of course, we have two issues. I mean,
11 you seem to be --

12 [REDACTED]

13 ATC [MS. BALTES]: Right.

14 MJ [COL POHL]: And then whether or not [REDACTED]
15 [REDACTED] is discoverable.

16 ATC [MS. BALTES]: Well, and I'm sorry, I didn't mean to
17 muddle those two issues. I guess what I wanted to go to was
18 we believe -- like the first intention is we don't believe
19 [REDACTED] is discoverable other than what we've
20 already provided, so we believe [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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9 Our position in this case is also that it is not
10 discoverable, we already provided the information, reports
11 anything else that we believe are discoverable to the defense.

12 [REDACTED]
13 [REDACTED] So if you decide that at some point in the case that
14 it is discoverable, it will be available to be provided to the
15 defense, but that is not a position that we are certainly
16 taking at this point. We ----

17 MJ [COL POHL]: We are not at that point.

18 ATC [MS. BALTES]: Correct.

19 MJ [COL POHL]: Of course, there's going to be a
20 discovery request for it ----

21 ATC [MS. BALTES]: Correct.

22 MJ [COL POHL]: ---- and then you will respond, and we
23 will go from there. I mean, the only issue before me is if --

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1 but at the end of the day, I guess it's a cart-and-horse
2 issue. If it is nondiscoverable, then there should be no
3 issue here, but since it is potentially discoverable. [REDACTED]

4 [REDACTED]

5 ATC [MS. BALTES]: Right. Again, I think again because
6 of the posture that we are in now, we filed the notice June
7 22, 2012. Since then, the defense has obviously filed their
8 opposition and their request for significant amount of
9 information access. So honestly, not to make this too
10 simplistic, but I think the actual issue before you today is
11 is it discoverable. And, if it is, has what we already
12 provided, does that satisfy that obligation? And second, do
13 the defense -- are they entitled [REDACTED]

14 Now, if you believe they are entitled [REDACTED]
15 [REDACTED] then we would prefer to hear that sooner rather
16 than later [REDACTED]
17 [REDACTED] But whether something is discoverable
18 or not, the government's contention is anything that is
19 possibly discoverable [REDACTED]

20 [REDACTED] and that is something you can
21 make a determination at a later date.

22 And in addition, I think is -- is detailed in the
23 submission that we provided. [REDACTED]

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1 [REDACTED]
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4 And one last thing, and I think this is also clear
5 in our papers, but just to make sure we are not -- there is no
6 confusion,

7 [REDACTED]
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15 MJ [COL POHL]: Okay. Thank you.

16 Mr. Kammen.

17 LDC [MR. KAMMEN]: I guess since today is the birthday
18 of the Army, happy birthday. Your Honor.

19 MJ [COL POHL]: Thank you.

20 DDC [MR. KAMMEN]: For the record, we continue to object
21 to Mr. Nashiri's absence during this proceeding.

22 MJ [COL POHL]: Okay.

23 LDC [MR. KAMMEN]: [REDACTED]

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10 And frankly, Your Honor -- and we will get into
11 this in a little more detail. Their reasons, I suspect, if we
12 saw their declaration, are disingenuous. I think their
13 reasons, if we saw their declaration, would be proven to be
14 substantially untrue. I mean no disrespect to the
15 prosecutors. I suspect they are operating under what they are
16 being told by other agencies, but the other agencies have a
17 history. The CIA certainly has a history of misleading
18 prosecutors in related cases. They have a history of
19 relating -- misleading judges in related cases, and I think
20 the pattern is continuing.

21 Let's look at where we are because where we are,
22 and based on the prosecutor's remarks this morning, I think
23 they are quite significant. The prosecutor acknowledges, and,

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1 of course, it seems to be a moving target, every time you try
2 to pin them down as to where we are on discovery, it's, well,
3 it's complete, but not really. And of course, you know they
4 are saying we want a trial schedule, we want a trial schedule,
5 but, you know, discovery is not complete.

6 Some day we will get photos; some day we will get
7 additional reports. But what we have now, Your Honor, I will
8 tell the commission, are a series of summaries that I believe
9 that at an appropriate time we will demonstrate are false.
10 That's very significant. The summaries are false, they are
11 misleading, they are woefully inadequate for any meaningful
12 presentation in a capital trial. They are absolutely
13 inadequate.

14 And this is part of the problem that we tried to
15 alert you to a year ago or more. Of course, they are -- we
16 can't -- you can't reconsider and we have this broke procedure
17 where we ask for more discovery and maybe you will intuit that
18 in ordering more discovery, but the summaries are false.

19 Secondly, as of right now, the summaries are still
20 not releasable to Mr. Nashiri. So we can't even discuss those
21 summaries with him to get his perspective on whether -- on how
22 false they are, how incomplete they are, how misleading they
23 are, how sanitizing they are. So with respect, we are

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1 troubled by the government's desire to do all of this in
2 secret.

3 Now, one of the things that is particularly
4 troubling to us is they say. [REDACTED]

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13 Frankly, Your Honor -- so that's the overview.
14 Frankly, we don't believe they have complied with the rules.
15 I don't want to revisit the arguments we made yesterday or the
16 day before yesterday regarding sort of the notice, but there
17 hasn't been any finding by the requisite, written findings by
18 the commission that would sort of trigger where we are today.
19 And as we read the rules, before we get to the place where we
20 are today, there should have been a finding -- we should have
21 been litigating the whole admissibility issue. They want to
22 do all this in the absence of a finding of admissibility and
23 to their --

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1 MJ [COL POHL]: You've lost me there. Admissibility of
2 what, to what?

3 LDC [MR. KAMMEN]: Of this evidence. [REDACTED]

4 [REDACTED]

5 MJ [COL POHL]: You used the term admissibility. You've
6 lost me here.

7 LDC [MR. KAMMEN]: Admissibility at trial. That's the
8 place. [REDACTED] So what they
9 want is, you know, essentially we should be having to fight
10 over admissibility [REDACTED]

11 [REDACTED] I think, and as I read the rule. [REDACTED]

12 [REDACTED]

13 So I think that they have sort of -- [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] And to their credit, they
19 are being forthright. [REDACTED]

20 [REDACTED]

21 MJ [COL POHL]: But the admissibility issue as it is
22 before this on this particular one, we are simply talking
23 about [REDACTED] not the admissibility of [REDACTED]

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1 it.

2 LDC [MR. KAMMEN]: I understand, but I think before
3 you -- [REDACTED]
4 you first litigate admissibility.

5 MJ [COL POHL]: And admissibility is what? [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 DDC [MR. KAMMEN]: If we assume --

9 MJ [COL POHL]: [REDACTED]

10 [REDACTED]

11 LDC [MR. KAMMEN]: No, that's a false choice. Your
12 Honor. [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 MJ [COL POHL]: Okay.

16 LDC [MR. KAMMEN]: We believe it -- [REDACTED]

17 [REDACTED]

18 [REDACTED] is admissible.

19 MJ [COL POHL]: Okay.

20 LDC [MR. KAMMEN]: If it is admissible, then the
21 question is [REDACTED]

22 [REDACTED]

23 [REDACTED]

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So as I said ----

6 MJ [COL POHL]: Back to my question, though, is when you
7 said admissibility ---

8 LDC [MR. KAMMEN]: Yes.

9 MJ [COL POHL]: ---- let's go -- I will take your
10 premise, it is admissible, okay. [REDACTED]

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13 LDC [MR. KAMMEN]: Are you making that finding?

14 MJ [COL POHL]: No, No, no.

15 LDC [MR. KAMMEN]: Okay. Well, see, that's the problem.

16 MJ [COL POHL]: No, that is not the problem. I am going
17 to tell you what the problem is, if I can finish. Operating
18 that it is admissible, then I would ask you, [redacted]

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20 You said that's a false
21 choice. How -- what are the other options?

22 LDC [MR. KAMMEN]: Well, as I understood your question,

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1 MJ [COL POHL]: Yes.

2 LDC [MR. KAMMEN]: Okay. I think there are middle
3 options. What we would do is three things:

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23 MJ [COL POHL]: Does it make any difference that -- and

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1 correct me if I'm wrong here, is --

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4 LDC [MR. KAMMEN]: Yes.

5 MJ [COL POHL]: Okay.

6 DDC [MR. KAMMEN]: Yeah, yeah.

7 MJ [COL POHL]: Okay. [REDACTED] and I
8 realize that question was inartfully formed, it is okay.

9 Okay.

10 So at a minimum, at a minimum,

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14 LDC [MR. KAMMEN]: Sure. Absolutely.

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16 MJ [COL POHL]: Okay.

17 LDC [MR. KAMMEN]:

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1 [REDACTED]

2 Now, I guess in terms of the procedure, if the [REDACTED]

3 first step you determine is sort of relevancy [REDACTED]

4 [REDACTED] I'm gathering that you have [REDACTED]

5 determined this evidence is relevant. [REDACTED]

6 [REDACTED] I think you actually have to determine admissibility of [REDACTED]

7 the sort of overall thing. [REDACTED]

8 [REDACTED]

9 MJ [COL POHL]: Are we talking admissibility or
10 discovery?

11 LDC [MR. KAMMEN]: Well ----

12 MJ [COL POHL]: I mean, if you want me to apply the
13 admissibility standard, you are asking for a higher ----

14 LDC [MR. KAMMEN]: Certainly we believe that it is
15 discoverable. We have been trying to get ----

16 MJ [COL POHL]: What I'm saying is, that's a lower
17 standard.

18 LDC [MR. KAMMEN]: Sure.

19 MJ [COL POHL]: Okay. And at this stage, at this
20 stage -- understand, don't take any of my questions as ----

21 DDC [MR. KAMMEN]: I don't.

22 MJ [COL POHL]: ---- I determined they were discoverable
23 or not. My only question was, if it is not discoverable, it

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1 makes no difference what I decide.

2 LDC [MR. KAMMEN]: Right.

3 MJ [COL POHL]: If it is discoverable, it does make a
4 difference.

5 LDC [MR. KAMMEN]: Yes.

6 MJ [COL POHL]: So the government's initial position is
7 it is not discoverable. And then I suspect there will be a
8 discovery request for it, if there isn't one already ----

9 LDC [MR. KAMMEN]: Well, there is.

10 MJ [COL POHL]: ---- somehow we are going to have to
11 litigate this anyway, so -- but be that as it may.

12 LDC [MR. KAMMEN]: In any event, let me just -- because
13 I may have lost my place.

14 You know, whether we are dealing with discovery,
15 whether we are dealing with admissibility, they are asking you
16 to make this decision in a vacuum. They are not -- they are
17 asking you to make this decision without [redacted]

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1 [REDACTED]
2 [REDACTED]
3 And finally, of course, I just make this for the
4 record because we are here, there has been no specific prior
5 written order [REDACTED] but
6 that failure is past us.

7 MJ [COL POHL]: Are you talking about the written order
8 closing this proceeding?

9 LDC [MR. KAMMEN]: Well, yes, and the written orders
10 that needed ----

11 MJ [COL POHL]: And understand, I announced it
12 yesterday ----

13 DDC [MR. KAMMEN]: Yeah, I understand you ----

14 MJ [COL POHL]: ---- and it has not been published yet.

15 LDC [MR. KAMMEN]: I understand. We feel that your
16 announcement was not specific enough, but that's behind us.

17 MJ [COL POHL]: Well, the order is going to look just
18 like that announcement, so if you don't think what I said
19 orally is specific enough, you're not going to think the order
20 is, too; but I understand your position now, Mr. Kammen.

21 LDC [MR. KAMMEN]: Thank you. Now, turning sort of back
22 to the merits, as I said, we don't have all the summaries.
23 They acknowledge that. And as I indicated and as our

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1 pleadings indicate, what we know from the summaries goes well
2 beyond what we're publicly allowed to acknowledge. Beyond
3 water boarding.

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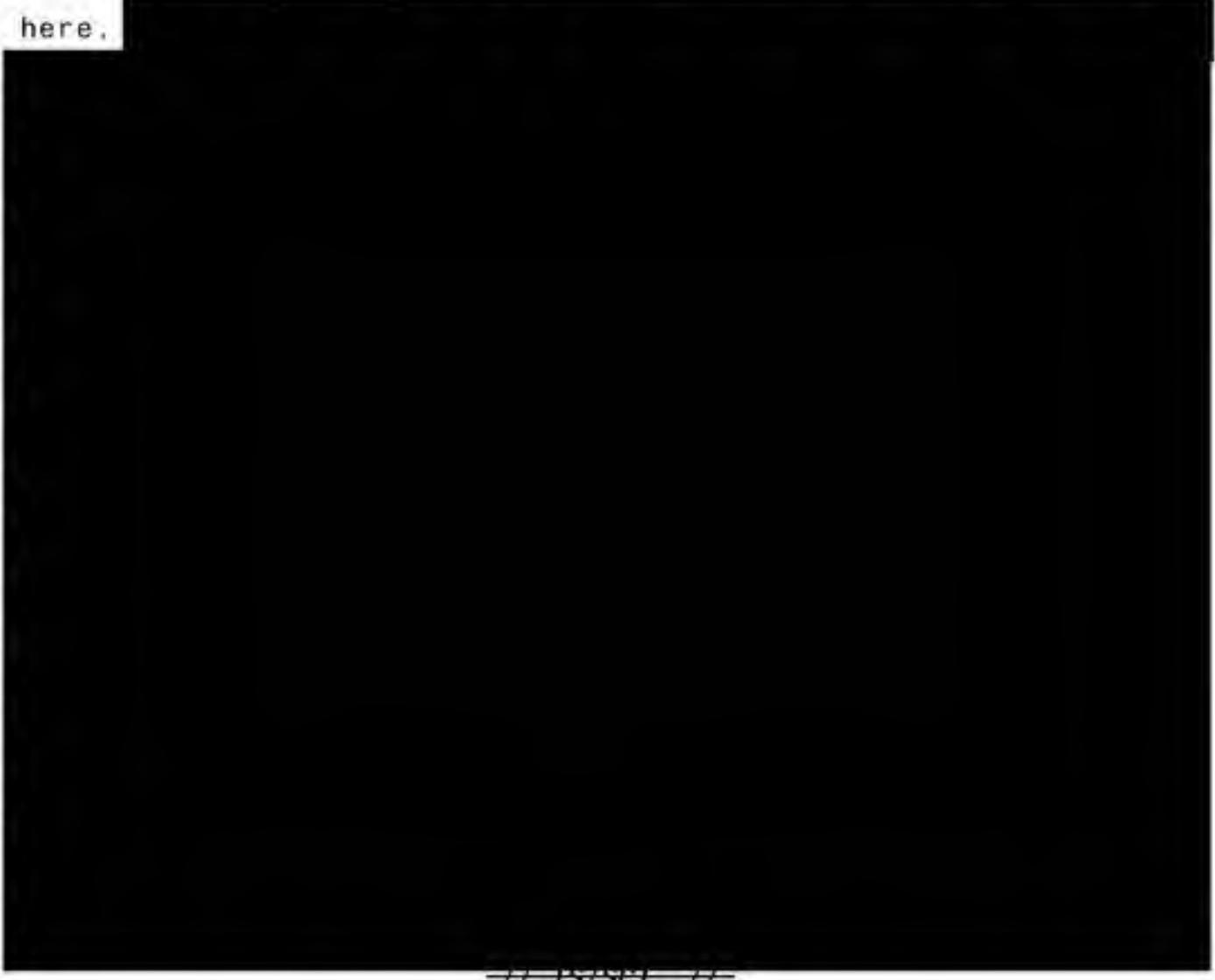
23 Now, there is another facet to this that's

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1 important and I think is the real reason behind this; and I
2 need to state this even though it may be in what you have been
3 provided, it may not be. But, you know, some of what we are
4 doing is for the historical record. I will allude to this in
5 a few minutes. But 25 years from now, probably after I'm long
6 gone, perhaps maybe they will hide it long enough until after
7 we are all long gone, somebody is going to look at this. They
8 are going to say what was the real truth here. The real truth
9 here.

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16 MJ [COL POHL]: [REDACTED]

17 [REDACTED]
18 LDC [MR. KAMMEN]: I'm sorry?

19 MJ [COL POHL]: [REDACTED]
20 [REDACTED]
21 LDC [MR. KAMMEN]: That's correct.

22 [REDACTED]
23 [REDACTED]

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6 MJ [COL POHL]: Okay, I understand your position.

7 LDC [MR. KAMMEN]: [REDACTED]
8 [REDACTED]
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10 [REDACTED]11 And, you know, look, I make room for the
12 possibility that we -- if we see all this, we might say, you
13 know, this is the greatest thing since sliced bread, [REDACTED]14 [REDACTED] Because I can foresee -- you are shaking
15 your head.16 MJ [COL POHL]: No, all I'm saying is, no, I just -- I
17 guess anything is possible in this life, not so much -- go
18 ahead, I'm with you. I understand what you are saying. You
19 don't know what is there until you look at it.20 LDC [MR. KAMMEN]: Yeah, I mean -- [REDACTED]
21 [REDACTED]
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23 [REDACTED]

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7 You know, the prosecutor says that the real crime
8 was committed in Aden, and certainly there is no question that
9 what was committed in Aden was a very serious situation;
10 whether it's crime and all that is one of the things this
11 court and other courts will sort out. But that's not the
12 crime we are referring to.

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13 So again, it is the secrecy that really gives us
14 pause. And as I said, in this context, while I mean no
15 disrespect to the prosecution, the history here, we just can't
16 be immune to the history here of deception to -- by varying
17 governmental agencies. Certainly to the extent the Department
18 of Justice in other cases has been unwitting -- has
19 unwittingly misrepresented things to courts, they are perhaps
20 at fault for not doing due diligence. We know what's happened
21 with the CIA and we know what's happened in other such related
22 situations also with the FBI.

23 So that is where we are. And we need to make it

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1 clear that from our perspective again, given the level of
2 secrecy and one-sidedness to all of this, we just have to
3 conclude that what this is really about is the government's
4 desire, the big G government's desire, really to hide the
5 truth. I mean, the fact we all -- the secret of all of this
6 is the reason we are here as opposed to in a real court is
7 because this is --

8 [REDACTED] Not you
9 personally. This procedure, I should say, [REDACTED]
10 [REDACTED] That is what
11 this is all about.

12 And at least for the historical record, they are
13 not going to admit it, but somebody needs to say it. And I'm
14 saying this next for the historical record, because, again, 25
15 years from now people will look at this and they really are
16 going to be asking some hard questions. They are certainly
17 going to be asking, well, was this lawyer adequate for the
18 job, and they will probably conclude he wasn't. They are
19 certainly going to be asking whether people at the other table
20 behaved with the historical vigor that their predecessors did.
21 And I'm struck by the difference.

22 After the Malmedy Massacres in World War II, there
23 was a military commission. And they were -- by our standards,

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1 there are a whole lot of things wrong with it procedurally,
2 and many of those people initially received death sentences.
3 But there was an army officer who was involved in that who saw
4 that they had been -- those German soldiers had been
5 mistreated in ways that don't even come close to what has
6 happened here. And rather than hide that truth and allow
7 those people to be executed, that army officer led a campaign
8 to have the truth come out.

9 And when the truth came out, people understood
10 that that commission had been painfully tainted. That's the
11 tradition that the army used to expect of its officers. And
12 certainly that is unfortunately what this prosecution is
13 about, is hiding that truth, not exposing it.

14 Similarly, the Department of Justice lawyers used
15 to be about hiding -- exposing the real truth about things the
16 United States has done. They want to try Nashiri, that's
17 fine. We don't -- we will fight that battle. But fight it on
18 the -- in an atmosphere of real truth, not hiding the truth.
19 And, of course, ultimately history will judge the decisions
20 you make.

21 Before you make this decision, at a minimum we
22 would ask that the government be ordered to provide us with
23 all the photos they say they are going to provide, with all

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1 the reports they -- additional reports they say they are going
2 to provide, with all the other stuff they say they are going
3 to provide.

4 [REDACTED]

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9 Let's not do this in secret.

10 They filed this motion to -- you know, in 2000
11 whatever.

12 [REDACTED] So
13 that is what we would suggest before you make this decision.

14 If you are going to make this decision without
15 those steps, we would certainly ask that, at a minimum, you
16 follow the order of Judge Emmet. Frankly, we would like some
17 opportunity to study that order in somewhat more detail to see
18 if there are any improvements we can make upon it.

19 Thank you.

20 MJ [COL POHL]: Thank you.

21 Ms. Baltes.

22 ATC [MS. BALTES]: Thank you, Your Honor. I have to
23 start off by both for me and for the rest of my team that I

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1 here -- represents -- I'm a prosecutor with the Department of
2 Justice from the National Security Division and the
3 Counterterrorism Section. I take my responsibilities very
4 seriously, both from professional and an ethical standpoint,
5 as I know the rest of my team does, including all of my
6 civilian colleagues from the Department of Defense and the
7 active duty components of our team, including General Martins
8 from the army. And I know this is a closed session and I'm
9 sure that I might not have to say this to you, but in the
10 interest of the historical record that is going to be created
11 here that Mr. Kammen keeps discussing, it would be egregious,
12 I think, to let the insults just go by.

13 We are coming here in an adversarial setting for a
14 ruling from the military judge. We have not gone and done
15 anything in secret. In fact, the United States Government
16 probably could have done this if they wanted to, but they
17 chose not to, and they chose to go both before a District
18 Court judge in charge of the habeas cases and before the
19 military judge in charge of the death penalty cases in 9/11
20 and Nashiri [REDACTED]

21 [REDACTED]
22 And Mr. Kammen may say that he is not faulting the
23 individual prosecutors in this case, but I take his comments

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1 about the integrity of the proceedings and the integrity of
2 the United States Government and those representing it very
3 seriously. We are not unwitting. I am well aware of the
4 facts in this case. I'm well aware of the national security
5 issues at stake. We have laid those out for you in the
6 ex parte filing, and I'm confident that there are no reasons,
7 other than legitimate national security reasons, of why the
8 United States Government [REDACTED]

10 And should you, in your position as the decision
11 maker on this issue, find that those reasons are lacking and
12 that they are for embarrassment or for some other legitimate
13 purpose, you certainly do not have to give us the relief that
14 we are requesting.

15 MJ [COL POHL]: Ms. Baltes, let me ask you a question.

16 You had mentioned earlier [REDACTED]

17 [REDACTED]

18 ATC [MS. BALTES]: Yes.

19 MJ [COL POHL]: Okay. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 ATC [MS. BALTES]: I think that the concern is that we

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1 are already a year into this litigation in this case.

2 MJ [COL POHL]: I understand.

3 ATC [MS. BALTES]: And for reasons outlined in the
4 ex parte declaration. [REDACTED]

5 MJ [COL POHL]: I understand.

6 ATC [MS. BALTES]: Not related to any illegitimate
7 national security reasons or reasons of embarrassment of the
8 United States Government.

9 MJ [COL POHL]: I understand them. I read the
10 declaration. I understand where you're coming from.

11 ATC [MS. BALTES]: [REDACTED]

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4 MJ [COL POHL]: What I'm saying is,

5 [REDACTED]
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1213 Understand I'm not -- sometimes I think people
14 misunderstand me. I'm not making any decisions here. I'm
15 just asking you, under your logic train, if we get to that
16 point.17 [REDACTED]
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1920 ATC [MS. BALTES]: Correct. I mean, look, my sense is,
21 and I'm not the person that makes the decision about,
22 obviously.

23 [REDACTED]

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4 MJ [COL POHL]: I understand that. I understand why you
5 are there. I got that.

6 ATC [MS. BALTES]: But, no, I think for potential
7 remedies -- let me back up. I think, number one, again, if
8 you determine that it is not discoverable,

9 [REDACTED]
10

11 [REDACTED] And so that is where I think it is important for
12 us to narrow the focus of what we are asking for.

13 If you determine that it is discoverable,

14 [REDACTED]
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20 I mean, certainly you can structure your order

21 [REDACTED]
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13 I do want to get back just to the issue of
14 discovery, though. The summaries are complete. Discovery, as
15 Commander Lockhart discussed yesterday, is complete. The only
16 things that are currently pending, the photos were newly
17 discovered items that will be provided to the defense within
18 probably the next week or so. And again, these are photos
19 that are not necessarily specific to any particular location.
20 they are just photos that were taken of Mr. Nashiri while he
21 was in CIA custody.

22 The other items of discovery that I mentioned in
23 my earlier presentation were the unredacted portions of IG or

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1 OLC reports that I believe are pending with you back in
2 Washington. Those are the only other items of discovery. So
3 we take issue with Mr. Kammen's characterization of that fact
4 that we are not -- we're not into discovery.

5 We do have outstanding the discovery motion 120
6 which does relate to items in the RDI program and to the
7 extent that there were any additional items that you ordered
8 us to review or turn over, certainly those would come in.
9 But, at this point, the discovery piece is completed for
10 purposes of the prosecution's case in case and for mitigation.

11 Again, I mean, I think Mr. Kammen's
12 characterizations of the summaries is misleading or sanitized.
13 You know, this is a process where we provide you with the
14 original source documents and you get to make a determination,
15 unlike in any other part of discovery where it is purely the
16 government decides what is turned over to the defense, it is a
17 more protective system of making sure that the defense gets
18 what they need in the case than if we were dealing with
19 unclassified discovery.

20 So we are confident that the summaries that have
21 been provided of Mr. Nashiri's treatment are accurate based on
22 the documentary reports and evidence that we have. Mr. Kammen
23 obviously, and the rest of his defense team, is free to

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1 discuss with his client what his client's recollection and
2 what he -- the treatment that he suffered. That is always an
3 option to him.

4 As far as I think -- I realize I went back to
5 discovery

6 [REDACTED] so let me jump back there. I'm sorry. You know,
7 Mr. Kammen talks about [REDACTED]

8 [REDACTED] Again, we are
9 in a position when we filed the notice, that again we don't
10 believe [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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6 As far as the mitigation evidence goes, I think it
7 is worth noting that, you know, mitigation evidence or
8 discovery is still grounded in the same theory of relevance,
9 just as anything else. There is no heightened sense of
10 relevance for mitigation evidence. The Supreme Court has not
11 rewritten the -- what the meaning of relevance is in a capital
12 case. That's ----

13 MJ [COL POHL]: But, again, in a capital case, is the
14 definition of -- what is mitigating is primarily the defense's
15 decision, isn't it?

16 ATC [MS. BALTES]: That is true, but if the defense is
17 seeking discovery from the government on -- and is using as a
18 basis for their discovery tool that it is mitigating, there
19 still has to be some relevance there.

20 MJ [COL POHL]: I got you. I got you. But we went
21 through this discussion earlier [REDACTED]

22 [REDACTED]
23 [REDACTED] and the defense says is mitigating, but I'm with

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1 you. The government -----

2 ATC [MS. BALTES]: Right. I mean, it has to be grounded
3 in something.

4 MJ [COL POHL]: It can't be just it is mitigating -----

5 ATC [MS. BALTES]: Right. And I think that -----

6 MJ [COL POHL]: I got you. I understand your position.

7 ATC [MS. BALTES]: Right. And the interesting thing is
8 if you look at case law on capital cases, then the mitigation
9 discussions in capital cases always goes to admissibility, it
10 always goes to what is admissible in a capital case. And the
11 cases always center on what the defense is seeking to admit in
12 as a mitigating factor and whether that is appropriate, and
13 that's where the courts talk about in it is -- it is, in the
14 eye of the defense, if the defense thinks this is mitigating.

15 But when we are talking about discovery, there is
16 still a relevance standard for discovery, and especially if
17 we're talking about classified discovery, again, it's got to
18 be more than a showing of theoretical relevance. So I think
19 we -- I have very well covered what the government's position
20 is on the discoverability [REDACTED]

21 But, as far as the Skipper analysis that
22 Mr. Kammen was talking about, I mean, the inmate's behavior
23 while awaiting trial on a capital crime, that's mitigating

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1 evidence if the prosecution seeks to show future dangerousness
2 in that if one of the aggravating factors, one of the reasons
3 why the government is seeking the death penalty is because the
4 defendant's future dangerousness, then surely, yes, the
5 defense is entitled to introduce mitigation evidence that the
6 accused inmate has actually behaved himself very well and
7 those are the cases ----

8 LDC [MR. KAMMEN]: If I could interject, Your Honor ----

9 MJ [COL POHL]: No.

10 DDC [MR. KAMMEN]: ---- I'm not certain this is a
11 discussion that we should be having in closed session.

12 MJ [COL POHL]: Well ----

13 ATC [MS. BALTES]: That's why there's going to be a
14 transcript that can be ----

15 MJ [COL POHL]: Yeah, I mean, but -- both of you kind of
16 got far afield, okay. The issue before me

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18 -- that's what's before me.

19 Okay. And I understand both sides have a tendency to say,
20 well, they said this, I want to give you my version of that.
21 I got it. But that is not before me. Whether it is
22 mitigating evidence or not down the road, that is not really
23 before me.

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1 You say it is a discovery issue and I can see
2 where that's kind of before me, but the real issue is
3 [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] Isn't that what is before
7 me?

8 ATC [MS. BALTES]: That is. That the only thing -- I
9 wouldn't characterize it as evidence. And I know for ----

10 MJ [COL POHL]: I know that. I understand that. But at
11 the end of the day, if it is not admissible evidence or it's
12 not discoverable, let's even go the lower standard, none of
13 this discussion matters.

14 ATC [MS. BALTES]: I absolutely agree. And the
15 only ----

16 MJ [COL POHL]: If we operate under the assumption it
17 might be discoverable and might be admissible evidence, then
18 the discussion does matter.

19 ATC [MS. BALTES]: Right. And the only reason why, the
20 only reason why I'm discussing discoverability cases and
21 relevant and mitigating evidence is because the defense is
22 seeking access, they are seeking discovery of [REDACTED]

23 [REDACTED] And so I'm responding to the extent that you want

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1 to make a decision about discoverability so you either don't
2 or do have to make a decision about the rest of it, that is
3 what I'm addressing.

4 MJ [COL POHL]: I got it.

5 ATC [MS. BALTES]: I know you know that -- the issues.
6 So I just wanted to put the government's position out there,
7 that mitigation is certainly undoubted. And if that is the
8 basis for the discovery request for the defense [REDACTED]

9 [REDACTED] we would object to that.

10 MJ [COL POHL]: Got it.

11 ATC [MS. BALTES]: Thanks.

12 MJ [COL POHL]: Mr. Kammen.

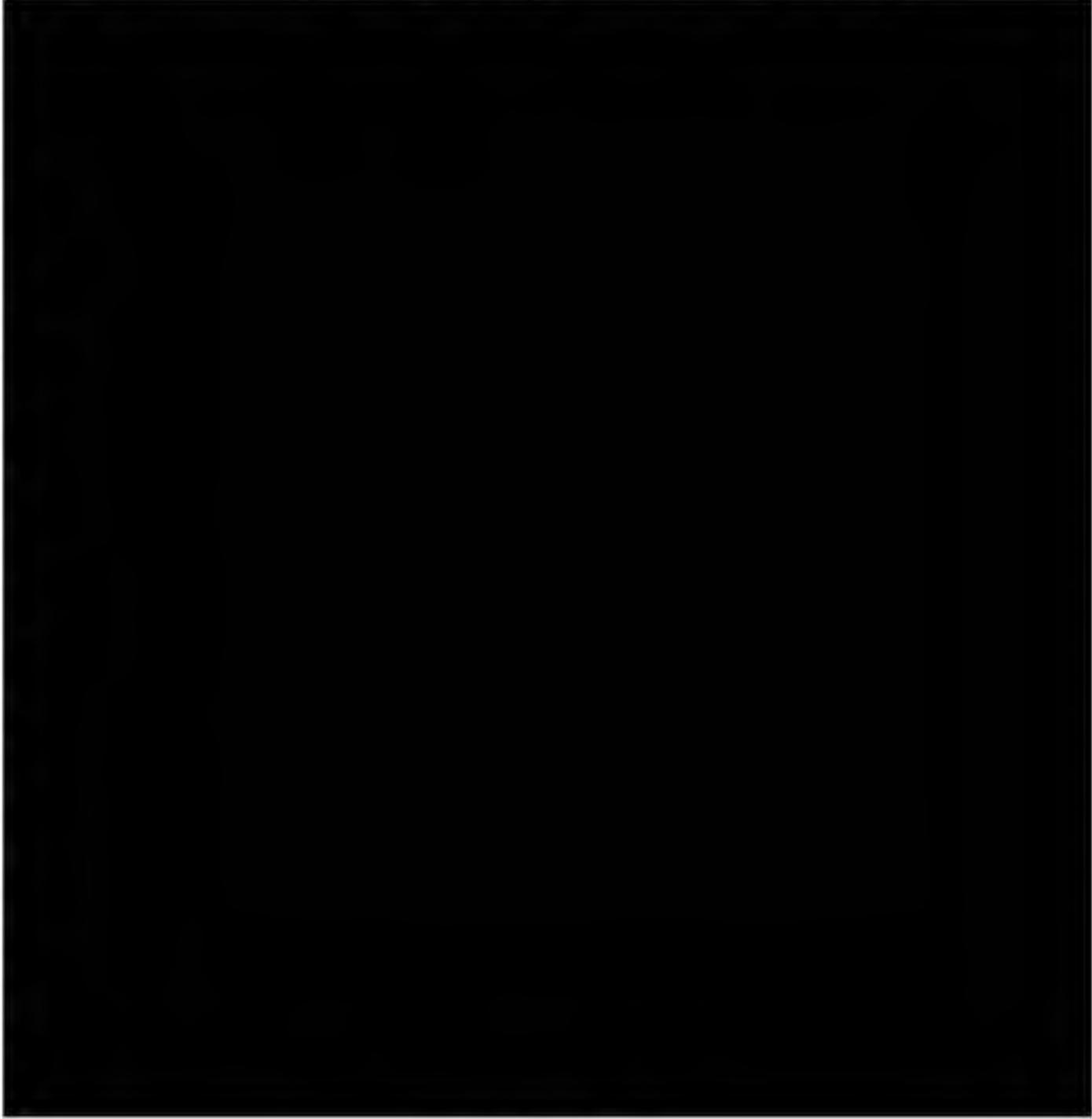
13 LDC [MR. KAMMEN]: Three or four things, and then I'm
14 done. Just I think it is obvious, but perhaps need to be
15 said. If we haven't received it, discovery is not complete.
16 When we receive it, we will receive it. And -- so they say,
17 well, maybe some day, but we have been hearing maybe some day
18 for months. And again, it concerns us because -- and I
19 understand what she is saying, but I think we need to
20 recognize that the reports they got are reports they got from
21 the CIA which were probably sanitized versions of the real
22 truth. And so what we have are sanitized versions of
23 sanitized versions that are themselves, when pieced together

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1 with information that is both publicly -- that is publicly
2 available, clearly false. And so that's our starting point.
3 And, unfortunately, that falsity infects our analysis.

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1 So, you know, the way to solve this
2 [REDACTED] even in classified. [REDACTED]

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9 But they say no, we can't do that.

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22 MJ [COL POHL]:

23 [REDACTED]

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1 LDC [MR. KAMMEN]: Yeah, absolutely.

2 MJ [COL POHL]: The issue is whether they can ----

3 DDC [MR. KAMMEN]: [REDACTED]

4 MJ [COL POHL]: ---- [REDACTED] absolutely.

5 DDC [MR. KAMMEN]: Absolutely.

6 MJ [COL POHL]: The only issue before us is whether they

7 [REDACTED]

8 LDC [MR. KAMMEN]: Frankly, I'm a little surprised

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 MJ [COL POHL]: Mr. Kammen, there has been no --

13 LDC [MR. KAMMEN]: I can't imagine -- I mean,

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 The final thing I will say, and then -- I know

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1 this is not the discovery discussion, but we have to
2 consistently remind the government, Brady versus Maryland is a
3 sentencing case. It is about the government's withholding of
4 exculpatory evidence that went to the defendant's death
5 worthiness in a Maryland death penalty case. And so when they
6 talk about, you know, what the discovery obligation of the
7 United States is, Brady versus Maryland was the case, is the
8 case, will be the case.

9 Thank you.

10 MJ [COL POHL]: Since this is a consolidated motion with
11 the other case, it's one of the few times that I will have to
12 rule in both cases, so we have to wait until we hear in the
13 other side. So I got the petition of the parties. I will
14 review the evidence and issue a decision at least not earlier
15 than until I have an opportunity for the other side to be
16 heard.

17 Any other further matters to take up at this time
18 on this case on this issue?

19 ATC [MS. BALTES]: No, Your Honor, only other than if
20 you want [REDACTED]

21 [REDACTED]

22 MJ [COL POHL]: Okay. At this point in time, I don't,
23 but I may change my mind. Okay.

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1 LDC [MR. KAMMEN]: And I will say that if they would be
2 willing. [REDACTED]

3 [REDACTED]
4 MJ [COL POHL]: I got it. Okay.
5 Commission is in recess.

6 [The Military Commission recessed at 1027, 14 June 2013.]

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